



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII
901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

22 JAN 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. James Haines
President and CEO
Westar Energy, Inc.
818 South Kansas Avenue
Topeka, Kansas 66612

SUBJ: Notice of Violation

Dear Mr. Haines:

Enclosed is a Notice of Violation (NOV) issued to Westar Energy, Inc. (Westar) under Section 113(a)(1) of the Clean Air Act, 42 U.S.C. § 7413(a)(1). In the NOV, the United States Environmental Protection Agency notifies Westar of violations of pre-construction permitting requirements of the Clean Air Act and the Kansas State Implementation Plan at the Jeffrey Energy Center.

If you have any questions concerning the Notice of Violation, please contact Ms. Dana Skelley, Office of Regional Counsel, at 913-551-7923.

Sincerely,

William A. Spratlin
Director
Air, RCRA, and Toxics Division

Enclosure

cc w/encl: Bill Eastman
Westar Energy, Inc.
Vic Cooper
Kansas Department of Health and Environment
David Tripp
Stinson Morrison Heckler LLP

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101

IN THE MATTER OF:

WESTAR ENERGY, INC)	Notice of Violation
)	
)	
Proceedings Pursuant to)	
Section 113 and 167 of the)	
Clean Air Act, 42 U.S.C.)	
§7413,7467)	
_____)	

NOTICE OF VIOLATION

This Notice of Violation ("NOV") is issued to Westar Energy, Inc. ("Westar"), formerly known as Kansas Power and Light and Western Resources, for violations of the Clean Air Act ("the CAA") at its Jeffrey Energy Center. Specifically, Westar has violated Title I of the CAA by failing to comply with Prevention of Significant Deterioration (PSD) requirements of the CAA and with the Kansas State Implementation Plan (SIP). Westar has also violated Title V of the CAA by failing to address the PSD provisions of the CAA as applicable requirements in its Title V permit for the Jeffrey Energy Center. This NOV is issued pursuant to Section 113 of the Act, as amended, 42 U.S.C. §§ 7401-7671q. The authority to issue this NOV has been delegated to the Regional Administrator of the United States Environment Protection Agency ("U.S. EPA," "EPA," "the Agency") Region 7 and further re-delegated to the Director, Air, RCRA, and Toxics Division, U.S. EPA, Region 7.

SUMMARY OF VIOLATION(S)

Units 1, 2, and 3 at the Jeffrey Energy Center began commercial service in 1978, 1980, and 1983, respectively. As originally configured, all three units had steam turbines rated at 720 megawatts/hr. From the onset of operation, the units had significant heat imbalances, slagging and plugging issues. As a result, the units could only operate at 660-680 megawatts/hr. Based on evaluations conducted in the early 1990's, Westar decided to undertake major capital projects at the Jeffrey Energy Center to restore lost capacity and gain new capacity resulting in more electrical generation. These projects include, but are not limited too, reheater and superheater replacement projects at Units 1, 2, and 3 between 1992 and 1997 and economizer replacement projects at Units 1 and 2 in 1999.

Based on information available to Westar prior to the physical and operational changes, and recently submitted to EPA pursuant to Section 114, the utility could have anticipated that the increase in capacity of the Jeffrey Units 1, 2, and 3 boilers would result in increased emissions and should have projected a net emissions increase from those boilers well above the "significance levels" established in the CAA for one or more regulated pollutants. Westar has in fact experienced such capacity gains and corresponding emission increases.

The Jeffrey Energy Center is located in an area that has at all relevant times been classified as attainment or unclassifiable for NO₂, SO₂, PM₁₀ and ozone. Accordingly, the Prevention of Significant Deterioration ("PSD") provisions of Part C, Title I of the Clean Air Act ("CAA") apply to modifications made at the plant. Nevertheless, Westar failed to obtain a PSD permit for these projects occurring at Jeffrey Units 1, 2, and 3 between 1992 and 1999.

Under the applicable Title V permit regulations, Westar was required to identify all applicable requirements, identify a compliance schedule for those applicable requirements for which the Jeffrey Energy Center was not already in compliance, and to certify its compliance with all applicable requirements. Westar's Title V permit for the Jeffrey Energy Center does not address PSD.

These violations of the Act and the Kansas SIP have resulted in the release of significant quantities of SO₂, NO_x, PM and/or PM₁₀ into the environment. Until these violations are corrected, Units 1, 2, and 3 at the Jeffrey Energy Center will continue to release significant illegal quantities of SO₂, NO_x, PM and/or PM₁₀ into the environment.

RELEVANT STATUTORY AND REGULATORY BACKGROUND

1. When the Act was passed in 1970, Congress exempted existing facilities, including the coal-fired power plant(s) that are the subject of this NOV, from many of its requirements. However, in the 1977 CAA Amendments, Congress also stated that this exemption would not last forever. As the United States Court of Appeals for the D.C. Circuit explained in Alabama Power v. Costle, 636 F.2d 323 (D.C. Cir. 1979), "the statutory scheme intends to 'grandfather' existing industries; but... this is not to constitute a perpetual immunity from all standards under the PSD program." Rather, the Act requires grandfathered facilities to install modern pollution control devices whenever the unit is proposed to be modified in such a way that its emissions may increase.
2. The PSD provisions require preconstruction review and permitting for modifications of stationary sources. Pursuant to applicable regulations, if a major stationary source located in an attainment area is planning to make a major modification, then that source must obtain a PSD permit. To obtain this permit, the source must agree to put on the best available control technology ("BACT") or in the case of a modification that is not major, must meet the emission limit called for under the applicable minor NSR program in the State SIP.

3. Pursuant to Part C of the Act, the Kansas SIP requires any person who proposes to construct or modify a stationary source or emissions unit to obtain a construction permit before commencing such construction and includes special provisions for construction and or modification of a major stationary source in an area designated as attainment. See: for PSD permits in attainment areas, Kansas Air Quality Regulations (K.A.R.) 28-19-17 through 28-19-17q, which were originally approved as part of the Kansas SIP on December 11, 1984, at 49 Fed. Reg. 48185, and since amended.
4. The Kansas SIP provisions identified in paragraph 3 above are all federally enforceable pursuant to Sections 110 and 113 of the Act, 42 U.S.C. §§ 7410 and 7413.
5. Pursuant to Section 502(a) of the Act, 42 U.S.C. § 7661(a), it is unlawful to operate without or in violation of a permit issued pursuant to subchapter V of the Act, 42 U.S.C. §§ 7661 *et. seq.*
6. Kansas' program under subchapter V of the Act was granted final approval on February 29, 1996 (61 Fed. Reg. 2938). These regulations are currently codified at K.A.R. 28-19-500 through 518. Pursuant to K.A.R. 28-19-512(a), the owner or operator of a stationary source which is authorized to operate pursuant to a class I operating permit shall assure that the stationary source operates in compliance with the terms and conditions of the class I operating permit.
7. K.A.R. 28-19-511(b)(11) and (12) require that a source submit an application that includes the citation and description of all applicable requirements and other specific information that may be necessary to determine the applicability of such requirements.
8. K.A.R. 28-19-511(b)(16)(B)(iii) requires that a permit application contain a compliance plan for emission units or stationary sources that are not in compliance with all applicable requirements at the time of permit issuance.
9. K.A.R. 28-19-511(b)(17) requires that a permit application must contain a certification of compliance with all applicable requirements.
10. K.A.R. 28-19-512(a)(26) requires that a source submit compliance certifications annually or more frequently as specified in the applicable requirement or by the department.
11. Pursuant to 40 C.F.R. § 70.1(b), all subject sources shall have Title V permit which ensures compliance with all applicable requirements.
12. Section 113(a)(1) of the Act provides that at any time after the expiration of 30 days following the date of the issuance of this NOV, the Administrator may, without regard to the period of violation, issue an order requiring compliance with the requirements of the state implementation plan or permit, and/or bring a civil action pursuant to Section 113(b)

for injunctive relief and/or civil penalties of not more than \$25,000 per day for each violation on or before January 30, 1997, and no more than \$27,500 per day for each violation after January 30, 1997. Sections 113(a)(1) and 113(b) also provide that the Administrator may take the same actions to enforce violations of subchapter V of the Act, 42 U.S.C. §§ 7661 *et. seq.*

13. Section 167 of the Act, 42 U.S.C. § 7477, authorizes the Administrator to initiate an action for injunctive relief as necessary to prevent the construction, modification or operation of a major emitting facility which does not conform to the PSD requirements.
14. As provided in Sections 113(a)(1), 113(b) and 167 of the Act, 42 U.S.C. §§ 7413(a)(1), 7413(b) and 7477, the violations set forth above subject Westar to injunctive relief and civil penalties.

OPPORTUNITY FOR CONFERENCE

Respondent may, upon request, confer with EPA. The conference will enable Respondent to present evidence bearing on the finding of violation, on the nature of violation, and on any efforts it may have taken or proposes to take to achieve compliance. Respondent has the right to be represented by counsel. A request for a conference must be made within 10 days of receipt of this NOV, and the request for a conference or other inquiries concerning the NOV should be made in writing to:

Dana M. Skelley
Assistant Regional Counsel
U.S. EPA, Region 7
901 N. 5th Street
Kansas City, Kansas 66101
(913) 551-7923

By offering the opportunity for a conference or participating in one, EPA does not waive or limit its right to any remedy available under the Act.

EFFECTIVE DATE

This NOV shall become effective immediately upon issuance.

Date

1/22/04



William A. Spratlin

Director

Air, RCRA and Toxics Division